SCHINDLER LIFTS (M) SDN BHD.

v.

SARAWAK PROPERTIES SDN. BHD. & ANOR.

HIGH COURT BORNEO
ABDUL KADIR SULAIMAN JC
[SUIT NO. KG145 OF 1988]
16 MAY 1991

CIVIL PROCEDURE: *Summary judgment - Principles of - Whether plaintiff has established a prima facie case.*

CONTRACT: *Contractual relationship - Sub-contract agreement - Privity of - Consideration - Promises to pay - Whether constitutes sufficient consideration.*

By an amended statement of claim dated 21 February 1989, the plaintiff avers *inter alia* that by correspondence the 1st defendant have represented to the plaintiff that they are responsible for payment.

The plaintiff's action against the 1st defendant springs from a sub-contract agreement ("the agreement") dated 15 March 1986 entered into between the plaintiff as sub-contractor and the 2nd defendant as the contractor.

According to the recitals, this agreement is supplemental to the main contract made between the contractor and the employer. However, there was no evidence to suggest who the employer was.

Clause 3 of the agreement provides that there would be no privity of contract between the plaintiff as sub-contractor and the employer.

Clause 11(b) provides that the 2nd defendant (the contractor) would pay the plaintiff in respect of work done within 14 days of the receipt by him of payment certificate issued by the architect.

However, Clause 23 provides that all payments due to sub-contractors shall be paid directly by the employer.

The plaintiff contended that the 1st defendant is the employer. On the other hand, the 1st defendant contended that the employer is Tamasa Holdings Sdn. Bhd. (Tamasa).

The plaintiff applied for summary judgment. The learned Registrar gave judgment for the plaintiff. Hence, this appeal.

Held:

[1] The procedure for summary judgment is intended to apply to cases which are virtually uncontested or uncontestable.

[2] It is for the plaintiff to satisfy the Court by *prima facie* evidence that is plaintiff must show to the Court who the Employer is if plaintiff is to succeed pursuant to Clause 23 of the agreement by producing the main agreement entered into between 2nd defendant and the employer.

[3] The learned Registrar was therefore wrong in attaching the blame on the 1st defendant for not producing the main contract as evidence.

[4] The learned Registrar also erred in holding that the 1st defendant by their payment certificates, telexes and oral representations are the employers in the said contract.

[5] Having considered further arguments in open Court, the learned Judge revoked the order made in chambers thereby allowing the application by plaintiff for summary judgment on the ground that there was a contractual relationship between the 1st defendant and the plaintiff, when at the desire of the 1st defendant, the plaintiff has abstained from taking action against Tamasa.

[6] This act of the plaintiff is sufficient consideration for the promise to pay by the 1st defendant. Thus, the plaintiff has a cause of action against the 1st defendant on the latter's promise to pay.

[1st defendant's appeal against the Registrar's decision dismissed. Costs to be taxed.]

Legislation referred to:
Contracts Act 1950, s. 2(d)

For the plaintiff - Christina Eng; M/s. C.J. Eng
For the defendant - David Sio; M/s. Chew, Jugah, Wan Ullok, Goh & Co.

JUDGMENT

Abdul Kadir Sulaiman JC:

By an amended statement of claim dated 21 February 1989, the plaintiff is claiming against the 1st defendant the sum of RM980,100 with interest and cost for the supply installation, testing and commissioning 8 units of lifts and 8 units of escalators in Taman Sri Phase II Commercial Complex on Lot 273 Section 48 Kuching Town Land District for the total sum of RM3,012,000. The sum claimed arose out of two payment certificates issued by the architect being 1st and 2nd payments due to the plaintiff.

The plaintiffs's action against the 1st defendant springs from sub-contract agreement (hereinafter referred to as "the agreement") dated 15 March 1986 entered into between the plaintiff as the sub-contractor and the 2nd defendant as the contractor. According to the recital, this agreement is supplemental to the main contract made between the contractor and the employer. However, according to the copy of the agreement produced, there was no evidence to suggest who the employer was. There is an express provision in Clause 3 of the agreement to the effect that there would be no privity of contract between the plaintiff as sub-contractor and the employer. Clause 11(b) provides that the 2nd defendant the contractor would pay the plaintiff in respect of work done within 14 days of the receipt by him of payment certificate issued by the architect. However, there was an addendum by Clause 23 relating to payment which states that all payments due to the sub-contractors shall be paid direct by the employer.

It is the contention of the plaintiff that the employer is the 1st defendant, hence the suit. Reliance is placed on the two payment certificates ('AF2' and 'AF3') issued by the architect. Under the "distribution" column, 1st defendant was named as the employer. On the other hand, the 1st defendant contends that the employer is Tamasa Holdings Sdn. Bhd., of Kuching, Sarawak (hereinafter referred to as "Tamasa") based on various documents produced. It started with the letter of offer of tender for the project in question. By Exh. 'SC1' the plaintiff by letter dated 11 June 1984 made an offer of the tender to Tamasa for the supply, installation, testing and commissioning of lifts and escalators for the proposed Taman Sri - Phase II Commercial Complex on Lot 273, Section 48 K.T.L.D., Sarawak for Tamasa Holdings Sdn. Bhd., for the sum of RM3,012,000. The standard form of tender for nominated

sub-contractor annexed to the letter named Tamasa as the building owner. By 'WYK1' the 2nd defendant by his letter dated 23 January 1985 addressed to the plaintiff informed the plaintiff that "your tender for the Supply, Installation, Testing and Commissioning of Lifts and Escalators Services for the above have been accepted by the Owner, Tamasa Holdings Sdn. Bhd.". This letter referred to the letter of the plaintiff in Exh. 'SC1'. Paragraph 1(d) of 'WYK1' stipulates that the plaintiff's work programme will have to follow the main contractor's work programme. The contract price is RM3,012,000. Paragraph 2 states:

> In accordance with the condition of subcontract, you are required to enter into a subcontract with us. The sub-contract documents are being prepared by the consulting engineers and you will be informed in due course when they are ready for signature.

A copy of that letter was extended to Tamasa. By plaintiff's Exhibit 'AF4', the plaintiff by letter dated 14 March 1986 addressed to Tamasa expressed concern and disappointment:

> at your continued non-payment for the equipment we have delivered to the site of this project. More specifically, we want to bring your attention to the amount of RM707,400 certified by Perunding Teknikal on 30 September 1985 for our delivery of 12 Escalators which is still outstanding. This means that we have not yet received a single payment from you since we were first awarded this contract in August 1984.

So from the above contentions, the plaintiffs's reliance on Clause 11 of the agreement as varied by Clause 23 is not a straightforward case of imposing the liability on the 1st defendant. The procedure for summary judgment is intended to apply to cases which are virtually uncontested or contestable. In the light of the evidence before me in this appeal, I am of the view that the plaintiff has failed to establish that he has a *prima facie* case and is entitled to judgment. It is erroneous to conclude at this juncture that the 1st defendant has no defence to the claim by the plaintiff by relying on Clause 23 of the agreement. The naming of the 1st defendant by the architect in the two payment certificates as the employer without more does not make the 1st defendant the employer for purpose of Clause 23 of the agreement. The whole issue stems from the absence of the party called the employer in the agreement signed between the plaintiff and the 2nd defendant. So for holding that "the 1st defendant by their payment certificates, Exhs. 'AF2' and 'AF3', telexes and oral representations have shown that they are the employers in the said contract and that they are responsible for payment", the learned Registrar has erred in her finding. The plaintiff is a sub-contractor pursuant to the agreement entered into with the 2nd defendant. There was a mention of the main contract entered into between the 2nd defendant and the employer. But the particulars of this employer is missing from the agreement and the main contract was never produced as evidence to show who the employer is. On the other hand, there are offer of tender letter, acceptance of tender letter and letter of demand by the plaintiff which give Tamasa as the building owner and person liable to pay to the plaintiff. Thus, the issue is contestable and therefore not a fit case for summary judgment.

The learned Registrar also relied on Exh. 'JL3(b)' and 'JL3(c)' as pointing to Sarawak Properties Sdn. Bhd., the 1st defendant as the "owner and developer of Tun Abdul Rahman Centre", hence the employer for purpose of Clause 23. I think the learned Registrar has fallen into error again for such reliance, as the 2 documents were never executed after their preparations. So no reliance at all should be placed on the documents in arriving at the decision.

Her finding that the affidavits of Chan Seng Chai and Wong Yik Ka contained only bare allegations goes against the weight of the evidence. Annexed to the affidavit of Chan Seng Chai is Exh. 'SC1' which tells Tamasa and not the 1st defendant as the person inviting for

tender for the project being the building owner. Annexed to the affidavit of Wong Yik Ka is Exh. 'WYK1' which again tells Tamasa and not the 1st defendant as the person who accepted the tender put forward by the plaintiff being the owner of the building.

In the application before the learned Registrar for the summary judgment, it is for the plaintiff to satisfy the Court by *prima facie* evidence that the order sought for should be granted. It follows, therefore, in this case that the plaintiff must show to the Court who the employer is if plaintiff is to succeed pursuant to Clause 23 of the agreement. This could be done by producing the main contract entered into between 2nd defendant and the employer as the particulars of the employer in the agreement is lacking. This, the plaintiff has failed to do. It is not for the 1st defendant to do so. Therefore, the learned Registrar was wrong in attaching the blame on the 1st defendant for not producing the main contract as evidence.

So, on this issue of employer to the project who would be liable for payment to the plaintiff pursuant to Clause 23 of the agreement, I hold that the plaintiff has failed to establish that he has a *prima facie* case against the 1st defendant and is entitled to judgment.

By the amended statement of claim dated 21 February 1989, the plaintiff avers *inter alia* that by correspondence the 1st defendant have represented to the plaintiff that they are responsible for payment. In chambers I ruled that there is a triable issue as well as to whether there exists a collateral contract between the plaintiff and the 1st defendant on account of the correspondence between the parties, that is, whether the promise of the 1st defendant to pay constitutes sufficient consideration in law to be bound to the plaintiff. Now, having the benefit of the further argument in open Court it gives an opportunity to me to reconsider my order in chambers. Having considered, I hereby revoke the order I made previously in chambers and thereby allowing the application by the plaintiff for a summary judgment against the 1st defendant for the sum of RM980,100 with interest at 8% p.a. from the date of judgment until full settlement, and costs to be taxed. I allow the application not on the ground that the 1st defendant was the employer envisaged by Clause 23 of the agreement but on the ground that there was a contractual relationship between the plaintiff and the 1st defendant when, at the desire of the 1st defendant, the plaintiff has abstained from taking action against Tamasa. This act of the plaintiff is sufficient consideration for the promise to pay by the 1st defendant. See s. 2(d) Contracts Act 1950 (Act 136). As stated earlier, by Exh. 'AF4' the plaintiff by the letter dated 14 March 1986 to Tamasa recognised the fact that Tamasa is responsible for the payment due to the plaintiff and the letter intimated ceasing from work on the project and a more drastic action for the non-payment of the amount due by Tamasa. Instead of allowing the plaintiff to pursue the matter with Tamasa, the 1st defendant by a letter in Exh. 'AF5' dated 15 April 1986, came out with a promise that "at the latest, by 31 May 1986, we would be able to sort out the technicalities with our bankers to settle your payments. We appreciate your co-operation and patience in this matter." Exh. 'AF6' is an affirmation of the earlier promise to pay and requested for an extension of time until 16 June 1986 to pay. Exhibit 'AF7' is yet another confirmation of the promise. In Exh. 'AF8' there was another request by the 1st defendant to the plaintiff to be allowed to pay half of the amount stated in the 1st payment certificate before 10 August 1986 and the balance on 10 September 1986. All these actions by the 1st defendant have resulted in the plaintiff not pursuing with the matter contained in Exh. 'AF4' against Tamasa. It was not until 27 August 1986 as in Exh. 'AF10' that the plaintiff communicated with the 1st defendant to say that they were very disappointed as all the past promises to pay the plaintiff for the work done have not been matched by the 1st defendant's action. In fact, the 1st defendant had taken the plaintiff for a ride. I am, therefore, more than satisfied that the plaintiff has a cause of action against the 1st defendant on the latter's promise to pay.

The appeal by the 1st defendant against the decision of the learned Registrar is hereby dismissed with costs to be taxed.

Also found at [1992] 3 CLJ 1473